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In The

Supreme Court of the United States

October Term, 1974

No. 74-1442

DONALD M. PETERSON,
Plaintiff-Petitioner,
v.

CASPAR W. WEINBERGER, SEC. OF DEPARTMENT OF H.E.W.; THE UNITED STATES OF AMERICA, THE ATTORNEY GENERAL AND THE FEDERAL DISTRICT ATTORNEY; MRS. MARTHA A. MCSTEEN, JIM ADAMS, CARL GRUNINGER AND DON CHANCELLOR, ALL EMPLOYEES OF H.E.W.; BLUE CROSS/BLUE SHIELD OF TEXAS, GROUP MEDICAL & SURGICAL SERVICE (MEDICARE INTERMEDIARY) AND GROUP HOSPITAL SERVICE, INC. (MEDICAID INSURANCE CARRIER); THE TRAVELERS INSURANCE COMPANY (MEDICARE INTERMEDIARY)
Defendants-Respondent,
v.

JAMES E. PETERSON,
Third Party Defendant-Respondent.

PETITION FOR WRIT OF CERTIORARI

On appeal from the United States Court of Appeals for the Fifth Circuit

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To the Honorable Judges of The U.S. Supreme Court:

OPINIONS BELOW

In this case the two opinions of the lower courts were re-

ported, as follows:

Peterson v. Weinberger (Dist. Ct. Tex., 1973) 370 F. Supp. 1259.[1]

Peterson v. Weinberger et al. (CA5, 1975) 508 F. 2d 45.[2]

There is a third reported decision in a companion case, as follows:

U.S. v. Peterson (CA5, 1974) 488 F. 2d 645.[3]

JURISDICTION AND BACKGROUND

The statutory jurisdiction of the Supreme Court is invoked pursuant to 28 USC Sec. 1254(1). The reported opinion of the appellate court, issued and entered on February 14, 1975, includes its entire decision. The appellant, Dr. Peterson, filed two petitions for rehearing. The first petition was denied on March 27, 1975, Exhibit F, and the motion to file the second petition was denied on April 23, 1975.

This case involves many causes of action, each one of which may serve as a basis for Federal jurisdiction. Plaintiff-appellant Dr. Donald M. Peterson seeks three different types of relief, based on four Federal statutes. One of the defendants, the U.S.A., cross-filed with an unrelated cause of action based on the False Claims Act, 31 U.S.C. § 231.

As to plaintiff's case, primarily appellant seeks an injunction against the Department of H.E.W., against conspiring Federal government employees and against three insurance

[1] For a copy of this opinion see in appendix, Exhibit A.
[2] For a copy of this opinion see in appendix, Exhibit B.
[3] For a copy of this opinion see in appendix, Exhibit C.

companies. The injunction would require the Secretary of H.E.W. to comply with a Federal statute, 42 U.S.C. § 1395(g). It would restrain other illegal acts, ending the nonfeasance of persons who refuse to lift sanctions wrongfully imposed and abusing this physician, by requiring compliance with a Federal statute: 5 U.S.C. §§ 551-559 (Administrative Procedures Act). The injunction would order an independent insurance company not to be coerced wrongfully by the Federal government, by a conspiracy which has harrassed appellant for six years by wrongfully interfering with his medical practice.

The second type of relief sought is a judgment with interest thereon, requiring payment of interest on the unpaid medical fees of $90,000 which were wrongfully withheld due to coercion from government employees. Thirdly, plaintiff seeks recovery in tort for the wrongful acts of defendants, who acted in concert to impose wrongfully sanctions on him, and in part such claims are based upon the Federal Tort Claims Act: 28 U.S.C. Sections 921 et seq., including 1291, 1346, 1402, 1504, 2110, 2402, 2411, 2412 and 2671 et seq. Fourthly, plaintiff was denied due process of law, with some 28 violations of the Administrative Procedures Act. *supra.*

The government (U.S.A.) was allowed to cross-file, asserting a claim against the Third Party Defendant (James E. Peterson) and the appellant, Dr. Peterson. This claim, asserted for the first time after a delay of more than 3 years from the time when sanctions were first imposed on Dr. Peterson, is based on the authority of a Federal statute: 31 U.S.C. § 231, referred to as the False Claims Act.

Finally, there is a jurisdictional rule of Federal courts that once jurisdiction is obtained over persons, then the entire subject matter in controversy between the parties comes before the court, *Deering Milliken Research Corp. v. Textured Fibres, Inc.* (CA5, 1969) 415 F2d 875; 28 USC § 1441(c); 21 C.J.S. Courts §§ 18, 22, 23, and 25; Moore's Federal Practice, 2d, Vol. 1A, page 621.

Thus, it is clear the Federal courts have jurisdiction over all the controversies herein. The U.S. Supreme Court has the power to review decisions of the lower Federal courts, Constitution, Article III, Sec. 1.

All the Plaintiff's causes of action were arbitrarily dismissed by the trial court, and James E. Peterson, along with the appellant, was fined for violation of the False Claims Act. The lower court was affirmed by the court of appeals. As a losing litigant in the Federal court of appeals, the appellant's proper remedy is a petition to the Supreme Court for a writ of certiorari.

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are many, unfortunately, due to numerous errors of the lower courts. The first seven questions relate to the False Claims Act case. The eighth question relates to both cases. The final six questions (9-14) relate to the Plaintiff's case.

FALSE CLAIMS ACT CASE

1. Is the $131,606.72 fine under the False Claims Act imposed on Dr. Peterson, in view of his noninvolvement, an "excessive fine," and therefore invalid under Amendment V of the U.S. Constitution?

2. Is the complex, harsh statutory penal scheme, as enacted by Congress and applied to requests for fee payments under Medicare, such as impose an excessive fine or to deprive appellant-physician of due process, and therefore is invalid and unconstitutional?

3. As the False Claims Act requires a "knowing" and "filing of false claims," and the facts show appellant *knew not* about the filing and he did *not* participate in the filing, is it error to fine him for violation of the statute?

4. Was it error to fine appellant in the instant case, when in its prior decision on the identical facts (the same alleged wrongful acts) the same court absolved appellant from guilt? Did not the court misconstrue the circumstancial facts in the instant case? Was not this second violation merged in and tried as part of the original trial? Or was there some other error based on double jeopardy or estoppel?

5. In view of the conflict among circuits and confusion in court decisions as to what "intent" what "knowing" and what wrongful act constitutes a violation of the F.C.A., should not this statute be clarified by the Court, particulary here, where the guilty appellant was clearly not even a participant in the filing of claims?

6. May a Federal court of appeals simply ignore its own

controlling precedent decision (*U.S. v. Priola*[4]), and here make an inconsistent holding without any reversal or reconciliation whatsoever with the earlier decision? Is this denial of due process, in violation of Amendment V of the U.S. Constitution?

7. As the appellant is in the position of an agent who has in good faith paid his principal the sums received from a third party, is he (agent) not thereby discharged from any liability, or in alternative is his liability not secondary to that of the principal?

F.C.A. CASE AND PLAINTIFF'S CASE

8. Where trial judge cuts off trial without appellant or his designated witnesses being called, though counsel asked that they be allowed to testify, is appellant thereby denied a fair rtial and due process?

PLAINTIFF'S CASE

9. Were not sufficient facts proven here — various wrongful acts in a concerted action of several defendants abusing appellant's medical practice — to establish the elements of a tort, and thus shift the burden to defendants who failed to justify their acts?

10. Where there is a refusal to permit pre-trial discovery (failure to allow inspection of complete governmental agency

[4] *U.S. v. Priola* (CA5, 1960) 272 F. 2d 589, holding an unknowing accused is not liable under the False Claims Act. And for three other decisions of the circuit to the sme effect as *Priola* see: *Henry v. U.S.* (CA5, 1970) 424 F2d 677. *U.S. v. Ridglea State Bank* (CA5, 1966) 357 F2d 495. *U.S. v. Aerodex, Inc.* (CA5, 1973) 469 F2d 1003.

file in a tort case based on wrongful conspiracy to abuse appellant's medical practice), was it error not to impose a proper sanction, as prescribed by Rule 37, Fed. Rules of Civ. Proc.? Are executive departments immune from pretrial discovery in cases brought under Federal Tort Claims Act?

11. May the lower courts simply ignore recent precedents such as *Goldberg v. Kelly, Scheuer v. Rhodes, Bivens v. Six Unknown Fed. Narcotics Agents,*[5] etc. . . ., or in other words are Supreme Court decisions the law of the land, which must be followed by lower Federal courts?

12. Was it error for the lower court to grant immunity to these defendants? Was it error to grant governmental immunity to field investigators here, based on the governmental executive rule of *Barr v. Matteo,*[6] ignoring subsequent Supreme Court decisions contrary to the instant case, such as *Bivens, supra?* Is not the Federal government liable under the Federal Tort Claims Act?

13. Where insurance company defendants are wrongfully induced to default in paying fees due appellant for medical services rendered his patients, is he not entitled to interest on the overdue, unpaid debt?

14. Where the Department of H.E.W. has wrongfully imposed sanctions on appellant for more than six years in viola-

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[5] The cittion of these U.S. Supreme Court cases are as follows: *Goldberg v. Kelly* (1970) 397 US 254. *Bivens v. Six Unknown Fed. Narcotics Agents* (1971) 403 US 388. *Doe v. McMillan* (1973) 412 US 306. *Logue v, U.S,* (1973) 412 US 521. *Scheuer v. Rhodes* (1974) 416 US 232. *Goss v. Lopez* (1975) .... US .... 42 L.Ed. 225. *Wood v. Strickland* (1975) .... US .... 43 L.Ed.2d 214.

[6] *Barr v. Matteo* (1959) 360 US 564.

tion of Federal statutes, such as 42 USC § 1395(g), is he not entitled to injunctive relief?

APPLICABLE STATUTES

As many provisions of the U.S. Constitution and Federal statutes are involved in this case, the text thereof have been included in the appendix as Exhibit D.

For a listing of the applicable provisions see the preface to Exhibits, entitled Schedule of Exhibits.

MATERIAL FACTS

This case began seven years ago in the fall of 1968, when an investigation was started of James E. Peterson, brother of appellant. The two operations investigated were Concord Manor, a nursing home occupied by aged patients, some of whom were Medicare beneficaries, and a physical therapy services operation. The latter was called Greater Irving Home and Health Agency (G.I.H.H.A.). It was an extensive operation which began providing physical therapy services under Medicare on July 1, 1968. The appellant, a physician in Dallas, was never in any way connected with his brother's physical therapy operations after June 30, 1968. These physical therapy operations of James Peterson were headquartered in Irving, Texas. This investigation was an unusual one in that it was conducted jointly by personnel of two organizations: (1) the Bureau of Health Insurance and (2) Group Medical and Surgical Service, a Medicare intermediary.

While this investigation was being conducted a second and smaller physical therapy operation of James E. Peterson in Irv-

ing, called Zodiac, prepared and filed in early April, 1969 some 120 forms, entitled "Request for Medicare Payment." These forms, the heart of the controversy here, were billings for physical therapy services rendered to Medicare patients during the six months, January-June, 1968. These forms were prepared using the Code number of Dr. Peterson (appellant) a physician qualified under Medicare. In addition, the appellant's signature thereon was forged. The appellant did not know in April, 1969 about the submission of these forms, nor of their contents. There was no evidence connecting Dr. Peterson either with the preparation or filing of these forms. For a more detailed discussion of the facts the reader is referred to the very astute analysis made in the opinion of *U.S. v. Peterson, supra,* a companion case, (CA5, 1974) 488 F.2d 645, Exhibit C in the appendix. A careful study of the facts, as made in the first opinion, is essential to a fair adjudication in this case. But an analysis of the circumstances is beyond the scope of this petition, other than to request that the two opinions be compared, *Peterson v. Weinberger, supra.* Exhibit B.

It is significant that in the forms filed by James E. Peterson the office address of Dr. Peterson was *not* used. Instead, as James Peterson desired that the checks be received directly by him, his post office box number in Irving was inserted on the forms, and at least one form was altered to delete the physician's address. But the checks nevertheless were mailed to appellant's office, as his physician Code number (9890) appeared on the form, and automatically the computer followed its instructions, ignoring writing to the contrary on the forms.

The checks ($15,803) were received in late May or early June, and were bunched together, and a single deposit was made by the physician's secretary. It is also significant that included in the deposit were other checks ($2,336) received for medical services rendered by the physician to his patients. Then the physician on June 3, 1969 knowing that the physical therapy services had been rendered by Zodiac, in good faith paid his debt to Zodiac with a check for the entire amount of the deposit, $18,139. Thus, Dr. Peterson carelessly overpaid Zodiac by including $2,336 of his personal funds, which amount incidentally has not been repaid to Dr. Peterson though payment has been demanded. As to Dr. Peterson, there was no intent to defraud.

Dr. Peterson learned of the filing (the wrongful act under F.C.A.) only when Medicare checks were received in his office several weeks after the filing. And even then he learned only of the act of filing. He knew not of the false element in the forms — that his signature was forged.

Dr. Peterson considered the June 3rd check for $18,139 (the amount of the total deposit made by his secretary) as a full discharge of the debt owed his principal. Subsequently in July, and again Dr. Peterson is not responsible for this, Zodiac (the principal) sent him six invoices in the amount of $21,126.70. This was confusing to Dr. Peterson, but as he believed he owed no additional amount, he made no additional payments. The appellate court misconstrued an answer of Dr. Peterson to questions about these invoices, taking the statement "because I did not owe the money" as referring to

the whole amount and not the additional $3,000 amount billed.

Carbon copies of the Medicare forms were retained in the offices of James Peterson. During June, 1969 the field investigators examining G.I.H.H.A. encountered these carbon copies. The scope of their investigation was extended to encompass these forms.

From the conduct of the investigators it became apparent that they had concluded that James Peterson must be terminated as a provider of services under Medicare. The substantial provider of physical therapy services, G.I.H.H.A., was suspended, though no civil or criminal action has been brought for the claims filed by it.

It was also apparent that the investigator desired to prosecute James Peterson, the principal, but concluded they had a weak case. Apparently they decided the prosecution needed an inside witness, and Dr. Peterson was selected for this role. The means for obtaining his cooperation would be the physical therapy forms filed by Zodiac, predecessor of G.I.H.H.A. To pressure Dr. Peterson to cooperate they secretly imposed sanctions on him, suspending the physician from Medicare, the Texas program for Medicaid and the Railroad Retirement program. To do this the field investigators in December, 1969 sent letters to the insurance companies directing them to suspend Dr. Peterson.

The suspension letters, patently on their face deficient, were invalid. But due to economic coercion of the government, naturally but wrongfully, the insurance companies complied

with their directions, though illegal. Dr. Peterson was not told of any of these suspensions, either by the investigators or by the insurance companies. There was no notice to him. There was no hearing. There was no determination. These investigators, took no action whatsoever in connection with Dr. Peterson's rights, though action is required by the Administrative Procedures Act.

Dr. Peterson's suspension, testified the investigators, was predicated on their belief (erroneous) that Dr. Peterson billed for certain physical therapy services, which had already been billed for by and paid to Concord Manor, in the amount of some $22,000. T.537. Such duplicate billing caused a $33 overpayment, and it resulted from an oversight of clerical workers. It was not negligence, for as shown by the Exhibits (Zodiac billing to Dr. Peterson), the office personnel took care not to make duplicate billings, as some patients were covered under Medicare and some were not covered. But more important there, Dr. Peterson was responsible in no way for either billing. Moreover, this testimony hardly seems credible, since the intent here is clear: to impose sanctions. The withholding from Dr. Peterson did not stop at $22,000, or even at $89,000.

Shortly thereafter Dr. Peterson inquired of the Medical Director of Blue Cross/Blue Shield why he was not receiving checks for medical services rendered his patients under Medicare and Medicaid. As a consequence he was reinstated as a physician-provider, and checks withheld by Blue Cross were paid to him. But when the field investigators learned of the

reinstatement, they again ordered sanctions imposed on Dr. Peterson. And again nothing whatsoever was said to Dr. Peterson.

Appellant was confused by the unwarranted harrassment, but he was persistent in his efforts to get reinstated, and he engaged three different lawyers to help. The first and the second lawyer withdrew. The Bureau and intermediary simply refused to make any concrete charges against Dr. Peterson, which could then be refuted. This plan of non-action was successful, lawyers previous to present counsel could get no relief for appellant, and seeing the futility of their engagement they resigned. All the time the financial pressure on the physician was increasing. He continued to treat these patients, to the exclusion of other patients, for he was not advised of any suspension. The sanctions continued, and he could get no information. In June, 1969 a conference was held by the field investigators, but this was not a hearing. Instead, it was merely a giving of *Miranda* warnings. No specific charges were ever made against Dr. Peterson at the conference. No hearing was held. No detemination was made. The acts of the field investigators were illegal.

Many efforts were made by appellant during 1970 and 1971 to collect the unpaid receivables of his medical practice, but he could never find out what was the cause of his harrassment. The investigators, the Bureau in Baltimore and Blue Cross refused to act and refused to communicate with Dr. Peterson's counsel. There was a conspiracy of silence. Among other efforts, the physician arranged for his U.S. Senator to

write a letter to the Department of H.E.W. In a quite appropriate letter, Senator Tower said he did not wish to influence the result, but he did ask that some disposition of the Dr. Peterson case be made promptly. This was not done. Finally, after suffering sanctions for twenty-one months the appellant petitioned for relief in the Federal district court in September, 1971. Thereafter, in October, 1971 finally the Department of H.E.W. acted by then referring its case file on Dr. Peterson to the Department of Justice. At the time his petition was filed in Federal court for relief Dr. Peterson was owed over $70,000. The sanctions were continued until April, 1972 when payments were made under an injunction of the Federal district court, for Justice itself was unwilling to correct the error and order payment made, as it was feared such an act would be construed as an admission of the previous wrongful act.

The appellant has always been cooperative, but he was simply unable to help the investigators, to serve as their witness against James E. Peterson. There was no plea bargain offer ever made by Dr. Peterson because he was unfamiliar with the facts about the business affiairs of his brother after his resignation on June 30, 1968. Nor was Dr. Peterson familiar with the business affiairs of his brother during the first six months of 1968, for his brother is a very secretive type of businessman.

As to Dr. Peterson's non-involvement with the filing of the 120 forms and as to the careless overpayment of $2,300, the government was fully aware of these facts in 1971. Dr. Peter-

son supplied all the evidence he had, and withheld no information from the investigators. There was no good defense for the wrongful acts of defendants in the tort action brought by Dr. Peterson. So the Washington office of Justice concluded their best defense was to launch a strong offensive against Dr. Peterson, though he was known to be the wrong defendant. Therefore, a forceful, vigorous attack was begun, in order to attribute to Dr. Peterson the forms filed by his brother, James Peterson. Thus, the harrassment continued after 1971 under the auspicies of Justice.

Criminal actions were brought. Three different indictments were obtained, each with full coverage by Dallas newspapers. The first indictment (May 2, 1972) was filed only against Dr. Peterson, alleging violation of 18 USC Sec. 1001 (making false statement to government). The second indictment charged violation of the two criminal statutes: 18 USC 286 and 18 USC 287. The third indictment, filed February 2, 1973, alleged offenses under 18 USC Sections 371 and 1001, and James E. Peterson was joined as a defendant. This third indictment was the basis for the decision in *U.S. v. Peterson* (CA5, 1974), which on January 18, 1974 reversed the conspiracy conviction as to Dr. Peterson. As the facts were fully-developed at the trial, so stated the opinion, there was no need for a new trial, for the facts showed positively that Dr. Peterson was not involved in the plan to make false statements. Appendix, page C-11.

The government investigators did not advise the physician's medical profession association of his suspension, though nor-

mally complaints and notice of any such action are sent to the association's Peer Review Committee. Nor was any notice of the sanction sent to the national medical association, though the Medicare coordinator of the association for years has resided in Dallas. On the other hand, concerned about the abuse of its member, the Texas association made two inquiries shortly before Dr. Peterson filed his petition in September, 1971. One inquiry was made by the associaiton's executive secretary to Mrs. McSteen, one of the defendants. Another inquiry was made by the chairman of its Peer Review Committee to the Medicare office - Baltimore. There was no reply whatsoever. Again in this case the bureau employees adhered strictly to their game plan — a conspiracy of silence, a cover-up.

As a normal consequence of having a government bureau who fails to reply in any way, prseumptions were made by many members of the association, and many physicians in Texas simply and normally concluded Dr. Peterson must be guilty of serious misconduct. Many fellow physicians imposed an informal quarantine on Dr. Peterson. The "not guilty" verdict in the first penal case served to dispel in the main the quarantine, though with some physicians doubts remain due to this second penal case. The complete lifting of this cloud on Dr. Peterson's professional career will occur only after the Section 231 charges herein are dismissed.

Then in the instant case, 16 months after the petition was filed, the government counter-attacked in this civil litigation. In January, 1973 it filed a crossclaim, joining James E. Peter-

son as a Third Party Defendant and seeking a recovery on the grounds of filing of false claims (False Claims Act, 31 USC § 231) from the principal (James E. Peterson) and the unknowing agent (Dr. Peterson) as well. Consequently, the instant case includes also a False Claims Act case of the government in addition to the rather complex plaintiff's case involving many classes of defendants and (1) injunctive relief (2) tort, conspiracy and exemplary damages and (3) suit in contract to recover debt and interest. Counsel for appellant found it necessary to waive the right of trial by jury due to the three circumstances: (1) the then outstanding verdict of "guilty" against Dr. Peterson, since reversed, (2) the complexity of the civil litigation, the trial judge refused to sever the two unrelated cases, and (3) the presence of James E. Peterson as co-defendant, which would be prejudicial to Dr. Peterson in any jury trial.

As to appellant's tort case, many frustrating attempts of pretrial discovery were made to inspect the case file. These efforts failed to produce the complete government files, and at a hearing during the trial the government gave no satisfactory explanation. We find appellant's attorney still trying to make pretrial discovery after the trial is almost over! And the short hearing was a farce, as the trial judge cut it off short and interrupted counsel 14 times in about 20 minutes of trial time. The trial court erred in not imposing proper sanctions, as requested.

As to both plaintiff's case and the F.C.A. case, Dr. Peterson was not allowed to call himself on direct examination as

a witness, though his counsel on several occasions asked that he be allowed to testify. In the pre-trial order submitted to the trial court, the estimate of total time was 60 hours, of which 32 was allocated to Plaintiff, 12 to defendants and 16 to Third Party Defendant. The other litigants were allowed additional time at the trial, while the time of appellant was reduced to less than 4 hours. Appellant was allowed to call only 2 witnesses, both of whom were defendants and hostile. Pliantiff's counsel was allowed only to cross-examine Dr. Peterson who had been called by the government as its witness. The trial judge ended the trial with appellant's counsel still trying to place appellant on the stand as a witness.

At the trial of the instant case a government witness (Martha McSteen) testified, despite the wrongful imposition of sanctions here, that there was no plan to grant a hearing or to reinstate Dr. Peterson after the conclusion of this litigation, either under Medicare or Medicaid. Under these circumstances an injunction should be granted to terminate this long-continued abuse of Dr. Peterson. Clearly the acts of defendants are in violation of Federal statutes prescribing (1) payments at least monthly, (2) non-interference with patient's selection of physician and (3) appellant's rights (to a hearing, determination, etc.).

As to plaintiff's case, Dr. Peterson's counsel was advised frankly by the trial judge before trial that he intend that there would be no trial of this action in his courtroom ever. The judge then made a pre-trial dismissal. There was no trial, as counsel for Dr. Peterson was not allowed to call his witnesses.

The appellate court in its opinion stated there was a trial of plaintiff's case before the False Claims Act hearing. A reading of the transcript shows the error of the appellate court, for no evidence was ever received by the trial court. In reality, the trial judge dismissed plaintiff's case without hearing any evidence, as would be done had a valid demurrer been filed, but it was not necessary here for defendants to file any demurrer.

As to the merits of the government's case against James Peterson for his operations under the name, Greater Irving Home and Health Agency, no charges have ever been filed against him. It is apparent the government has been more concerned with continuing its harrassment of Dr. Peterson, as a means of defending against its mistakes.

In June, 1973, before the reversal of Dr. Peterson's conviction by the Fifth Circuit, there was a trial by the Federal district court of the instant case without a jury. There was an arbitrary dismissal of plaintiff's case. The trial court concluded that Dr. Peterson and James E. Peterson were jointly and severally liable for filing false claims and under Section 231, and assessed a liability of $131,606.72. On appeal to the Fifth Circuit, the lower court was sustained in all respects. *Peterson v. Weinberger* (CA5, 1975) 508 F2d 45.

For the filing of one erroneous "Request for Medicare Payment," a physician may be subject to penalities under Federal law in the total amount of $52,000 plus 26 years imprisonment, plus double damages. See Exhibit E.

As a result of the criminal prosecution, Dr. Peterson was

subjected to three indictments, the horror of criminal trial, and the suspense of an appeal before his innocence was proclaimed. In addition, he sustained money losses, as his defense costs of the criminal cases exceeded $30,000.

The appellant's petition for rehearing was denied by the Fifth circuit court of appeals on March 27, 1975, Exhibit F in the Appendix.

SUMMARY OF ARGUMENT

In the first part of this summary appellant's contentions on the False Claims Act case are mentioned point by point. Plaintiff's case is summarized in the latter part.

1. Unconstitutional — Excessive fine.

The excessive fine of $131,606.72 here imposed against appellant violates Amendment VIII of the Constitution, which provision prohibits "excessive fines." The Constitutional rights guaranteed U.S. citizens by the Bill of Rights, Amendment VIII, are important and substantial. This fine imposed under the False Claims Act is contrary to Amendment VIII is invalid, and it is the duty of the Supreme Court to set it aside.

2. Unconstitutional — Complex statutory scheme invalid.

The complex statutory scheme of fine and penalties,* as enacted by Congress, for Medicare forms filed by physicians for medical fees is virtually a cobweb for entrapment, forcing plea bargaining for a lesser offense. As such, the statutes deprive physicians of due process, permit double jeopardy and

*See footnote 7, infra.

impose excessive fines, and thus are contrary to Amendments V and VIII, and therefore are invalid. Thus, the Court should set aside the fine imposed under an invalid statute.

3. No violation of False Claims Act by Dr. Peterson.

The appellant's acts here failed to violate the False Claims Act. The statute requires a "knowing," and appellant first learned of the filing weeks after it occurred. The gravamen of the F.C.A. is simply the "filing of false claims," and a later payment of any money is independent and not a material part of the wrongful act. Appellant did not participate in the filing. Appellant's first and only act here, unconnected with the filing, was the receipt and forwarding of the money.

4. For the same acts, allegedly wrongful, Dr. Peterson was previously adjudged "not guilty." In the instant case he is not guilty as well.

5. As to "intent," "scienter," and "knowing" as elements of the wrongful act under the F.C.A., there is confusion in the decisions, inconsistency in the law and a conflict of circuits, which should be resolved, particularly in the instant case, where the holding is clearly contrary to the wording of the statute (as to "knowing").

6. Here intent was implied to Dr. Peterson, though the same court of appeals in a prior decision in 1960 held that intent may not be imputed, and the court has not overruled that precedent. Stare decisis is here violated.

7. Though the Third Party Defendant (the principal) may be liable under the F.C.A., the appellant (agent) who in good faith paid the money is not.

8. There was no fair trial, as plaintiff was not allowed to call his witnesses.

9. The elements of a tort were proven by appellant, and there should be a hearing granted on the amount of damages, if any.

10. As there was a refusal to permit pre-trial discovery, sanctions should be imposed on the defendants, Rule 37 of F.R.Civ.P.

11. There is liability here under the Federal Tort Claims Act; the lower courts must follow *Bivens*, *infra*, and the other recent cases and the statutes.

12. The defendants here are not immune from liability. None of them.

13. Appellant is entitled to interest on the money withheld from him.

14. To end this wrongful abuse, appellant is entitled to an injunction.

ARGUMENTS

This case involves two entirely different and unrelated controversies a False Claim Act primarily against James E. Peterson and a Plaintiff's case brought by Dr. Peterson for tort damages, judgment for fees due him with interest and an injunction.

The various issues presented in this appeal are herein discussed one by one, in the order indicated in the following outline:

False Claims Act case

Excessive fine unconstitutional

Multiple penal statutes violate constitutional rights

As no violation of F.C.A., fine erroneously imposed

Prior acquittal, correct and conclusive

Conflict of circuits, confused F.C.A. law

Ignoring stare decisis violates right to due process

Having paid principal in good faith, agent discharged

F.C.A. case and Plaintiff's case

No fair trial

Plaintiff's case

Tort proven

Rule 37 sanction proper against refusing governmental agencies

Defendants liable and not immune

Interest payable on unpaid debt

Injunctive relief necessary

Excessive Fine — Unconstitutional

This proceeding, once the False Claims Act controversy was introduced, has been dominated thereby, as intended by the government, naturally, for a huge fine is involved. This $131,606 fine is assessed against Dr. Peterson, jointly and

severally with his brother, James E. Peterson. Though brothers, the relation of these two ends there. They were not business associates here, James Peterson was the principal and operator. As to the brothers there are only differences, contrasts and opposites, as indicated by a review of the trial record. James is clever, sophisticated, a graduate of Harvard Business School, a promoter and exploiter. On the other hand, the appellant, a physician, is considerate, generous to a fault, trusting, naieve in business affairs and a humanatarian.

Two Supreme Court decisions are worthy of mention to the Court. In the earlier decision, *Pervear v. Mass.* (1867) 5 Wall 475, it was held that a fine of $50 plus 3 months imprisonment was not in violation of Amendment V, for operating a liquor store without a license. See also *Badders v. U.S.* (1916) 240 U.S. 391, 60 L.Ed. 706, 36 S.Ct. 367, which held a $7,000 fine not excsesive under Amendment VIII. Apparently the Supreme Court has never before been confronted with a case like the instant one, where clearly an excessive fine has been imposed.

In determining whether a fine is excessive, and therefore void under Amendment VIII of the Constitution, due consideration must be given to the fact situation. Here as indicated in the discussion of facts, appellant had no malicious intent. He had no knowledge of the wrongful act. He was an unknowing participant. The absence here of findings of fact on four important matters is significant, for if any such facts could have been found the lower court would certainly have

made them to support its verdict. As to the four facts hereinafter stated, the evidence proves as to Dr. Peterson that:

(a) he in no way participated in the filing,

(b) he knew not about the filing,

(c) he knew not about the false element in the claims, and

(d) he had no economic interest whatsoever in the claims.

The appellate court remarked on the good faith of appellant, as to his only act of participation, the writing of a check to Zodiac, who had performed the physical therapy services.

The participation of Dr. Peterson here is a *de minimis*, and it consisted of an act subsequent to and independent of the wrongful act of filing false claims. Under these facts the amount of fine assessed against Dr. Peterson is cruel and excessive, and therefore is invalid under Amendment VIII.

Multiple Penal Statutes Violate Constitutional Rights

Appellant's second contention on Constitutional grounds is this: the existing multiple Federal statutes create a situation which deprives appellant, and like persons accused, of rights guaranteed by the Bill of Rights, by imposition of excessive fines, double jeopardy[6] through harrassment of trials, and due process by deprival of any trial, as a practical matter.

There are many Federal penal statutes applicable to a single

[6] Double jeopardy protects against multiple punishments for the same offense. *U,S. v. Wilson* (1975) ..... U.S. ....., 43 L.Ed.2d 232, 241, citing *North Carolina v. Pearce* (1969) 395 U.S. 711, 23 L.Ed.2d 656, 89 S.Ct. 2072.

act of an accused.[7] These penal statutes are in addition to the common law of the states, providing punishment for the wrongful acts of deceit and fraud. *U.S. v. Silliman* (CA3, 1948) 167 F.2d 607. Further, a review of the 7 Federal statutes, Exhibit E of Appendix, shows that the penalty of each statute is in addition to, not in lieu of, each other statute. To illustrate in the case at hand, Dr. Peterson after he had been found not guilty of violating Section 1001 of Title 18 extended considerable effort over many months to get dropped the indictments against him under Section 286 and Section 287 of Title 18, all brought on the same allegedly wrongful act. And now in the instant case, he must defend against charges brought under Section 231. All charges are predicted upon the one alleged wrongful act of appellant, namely, making payment of $15,300 to Zodiac, who performed the physical therapy services billed for by James Peterson. For the one act there should be one trial and one penalty, *Braverman v. U.S.* 317 US 49.

It is beyond the scope of a petition to summarize all the statutes, reconcile them, and the cases thereunder. But it is

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[7] Among the Federal penal statutes under which multiple charges may be brought for each single reimbursement form filed by a physician are the following: (Those marked with asterisk indicate charges were brought against the appellant in harrassment in the Federal courts).

Title	*Section*	*Charges Made*
18	286	*
18	287	*
18	371	*
18	1001	*
31	231	*
42	1395(nn)	
42	1395(h)	

(See also Exhibit G.)

readily apparent from Exhibit E of this petition, the complex penal scheme as an entirety is not unlike an octopus, providing Justice Department and the Bureau with many arms for attacking victims. Likewise, the multiple-statute scheme, enacted from time to time by changing Congresses over more than a century, is essentially a cobweb for entrapment. Because of the impossible situation created for an accused, they are unconstitutional, and thus are invalid as to this appellant. Is it not the purpose of the Bill of Rights to protect the people from overly abusive penal statutes enacted by the legislature?

Any person accused under these statutes, like the appellant, faces a dilemma, which may be defined as a situation involving a choice between equally unsatisfactory alternatives. This dilemma has been called a plea bargaining situation, where an accused accepts a lesser penalty to avoid the risk of trial on a threatened greater charge. And supposedly this procedure has social merit, and thus would be acceptable if one overlooks the individual's rights. When an accused is offered a lesser offense and penalty for a plea of guilty in lieu of multiple prosecutions, as a practical matter he must accept. He is a fool not to surrender his right to a trial. As a practical matter, though, accepting the plea bargain has deprived him of his right to trial, because for economic and other reasons he is compelled to accept the offer whether innocent or guilty. For example, here, though innocent, this physician has spent more than $30,000 in defending himself against the three criminal indictments alone, not including the instant charges under the False Claims Act. Thus, here there was no plea bargain made, and appellant

has stood trial and paid the high cost of defending against the multiple attacks. As a practical matter this second alternative of the dilemma is also unconstitutional. The accused's legal costs of multiple defenses amounts to an excessive fine. Appellant further contends the multiple harrassments become double jeopardy, which is prohibited by Amendment V. It is called to the attention of the Court that the harrassment of Dr. Peterson — his fines and legal costs — have not yet been ended, though in fairness and justice, as it exists in America, that should have ended.

It is appropriate to illustrate the excessiveness of fines, as applied to a physician presenting a "Request for Medicare Payment." For a single $8 office visit of a patient insured under Medicare, assume a physician with the assistance of his secretary files not one but two forms for the single treatment. As shown by the summary of the many statutes enacted by Congress, Exhibit E of Appendix, each of the conspirators may be charged with penalties of some $52,000 in fines and 26 years in prison. It is no defense to say the bureaucrats will be fair — look not further than the instant case. Nor is it a valid defense to say the Federal courts would prevent this, for as a practical matter many cases never reach the courts. For it is only a fool, like the accused here, who would fight to correct this wrong. Any reasonable accused entrapped in this cobweb would actually fight for the opportunity to enter his plea bargain, of guilty on a lesser offense to escape the more dangerous cobweb.

The situation here is simple. Congress has overlegislated,

giving to bureaucrats too many powers (here the Bureau of Health Insurance) and likewise Justice Department attorneys are overly vested with power. From this power has come abuse of rights. Here in the instant case the record against both groups is not clean, for they have both taken action against Dr. Peterson for ulterior motives. But the abuses arising from plea bargaining, in general and in this case, and how its use has deprived citizens of their rights, cannot be fairly presented in this petition. But in response to the Court's request, counsel would be pleased to amplify appellant's contention.

As No Violation of F.C.A., Fine Erroneously Imposed

The gravamen of the False Claim Act is simple: the act of filing a false claim. Here there was no evidence whatsoever, no findings of fact by the lower courts, connecting appellant with the *filing*. As clearly stated in both lower court opinions, the appellant's only connection with the claims is the act of depositing checks received. This later act is entirely independent of the *filing*, and was separated by 8 weeks of time.

The wrongful act under the F.C.A. is the mere *filing*, and it is immaterial whether checks are ever issued. For the intent of Congress was to discourage the presentation of false claims. Other penal statutes, and the common law crimes, are available for other wrongful acts. Here the separation is clear, as between the two wrongful acts, though the lower courts erred in not making a proper separation. On the one hand, the filing of these forms here was one act. On the other hand,

the handling of checks received 8 weeks later (the only act of appellant) is an entirely different, independent act. While the former act of filing may have been a violation of the F.C.A., the latter act is not. See the wording of the statute, Exhibit D of Appendix.

The error here may be explained by pointing out three findings of fact. These facts were not found as facts, for they were not proven by the evidence. But to find appellant guilty of violating the F.C.A., the lower court should have found in order to support its verdict: that,

(1) accused filed the claims,

(2) accused knew of the false element in claims when filed, and

(3) accused had the intent to defraud.

There was an absence of these essential findings. The spurious reasoning of the lower court to support its finding of guilt of appellant is unsound. Absent these findings, which cannot be made, the appellant cannot be held in violation of the F.C.A. The situation here is one where the court has concluded guilt though the essential facts serving as predicate for such guilt have not been found. The acts of the appellant, though he finds himself adjudged guilty, simply do not violate the terms of the statute.

Note that as to the separate crime of fraud, it would be predicated upon both the act of filing and the act of handling the money. Appellant has been tried on both, *U.S. v. Peterson, supra,* and found not guilty. In the instant case the wrongful

act is predicated only upon the *filing* alone. And in the lower court opinions it is admitted Dr. Peterson did not participate in the filing. His act was to pay the money to its apparent owner. The acts of Dr. Peterson do not constitute a violation of the F.C.A.

Prior Judgment of Acquittal Correct and Conclusive

In a previous decision involving the same allegedly wrongful acts Dr. Peterson was acquitted, see *U.S. v. Peterson* (CA5, 1974), *supra*, Exhibit C of Appendix. Appellant contends such acquittal was correct and also conclusive. A reading of that opinion shows a careful analysis was made of the evidence and facts, and it shows a keen insight. From the record the appellate court was able to discern the naivete of the accused from his testimony and conduct here.

As to the inconsistent results, an abhorrence of the law, appellant's principal contention here is that in the second case the court erred in evaluation of the circumstantial facts. The conclusion in the first decision is logical, as is apparent from reading it. If the second opinion is then read and compared with the former, the second is seen as deficient and illogical. Many significant facts, mentioned and considered in the first opinion, were ignored in the second opinion. For example, the marking out of the physician's address on one preprinted form, and inserting there in its place the Irving post office box of James Peterson. Another fact carefully developed in the second case involves the $2,300 overpayment carelessly made by Dr. Peterson. This substantiates the absence of any

intent by appellant to defraud, an essential element for any violation of the F.C.A.

Reference is here made to one of several inconsistent holdings here of the court of appeals. It is an inconsistency very confusing and frustrating to appellant's counsel, and very unjust to appellant. The same court on the same day, in fact the same judge, was inconsistent in the two opinions handed down by the court. Compare the opinion in the instant case (*Weinberger)* with that in *Peterson v. Blue Cross/Blue Shield of Texas* (CA5, 1975) 508 F2d 55, petition for writ of certiorari pending with U.S. Supreme Court. The latter case is a companion case to the instant case, except different causes of action and different parties are involved. There is also another companion case, *U.S. v. Peterson* (CA5, 1974), see Exhibit C of the appendix (this third case is referred to as the *Peterson* case and the first penal case.

The appellate court had a problem in writing its decision in the *Blue Cross/Blue Shield* case as no hearing was ever held, no evidence ever introduced. There was a deficiency in that there were no facts to support the conclusion made by the court of appeals. To solve this problem the court of appeals made the necessary findings in the instant case, the *Weinberger* case. Then, in its opinion in *Blue Cross/Blue Shield of Texas* the findings made in *Weinberger* are duly noted, adopted and followed in the *Blue Cross/Blue Shield of Texas* case. The appellate court did this on its own motion, not as a result of motions of the defendants. Thus the appellate court found itself bound and governed by its decision in a companion case,

both as to findings of fact and conclusions of fact contained in the companion case.

Now let us turn to two other companion cases, the first penal case (the *Peterson* case) and the second penal case, the instant case or *Weinberger* case. The appellate court in its opinion in the first penal case concluded that Dr. Peterson did not participate in making false statements, nor did he conspire to do so. This conclusion was reached after a careful analysis of the facts was made in a quite logical opinion. Now in the instant the previously made conclusions are not adopted, instead, the court now concludes to the contrary, though the same acts are involved. The exhibits are the very same forms as those presented in the first trial. The same one act, allegedly wrongful, by Dr. Peterson is involved — the payment of $18,000 to Zodiac; all the elements of the wrongful act in the instant case were evaluated and adjudicated in the first penal case.

Counsel concedes that a court is not always required to be consistent, for a court may be able to justify different results. But here no reconciliation was attempted. Why the inconsistency here, with the same act?

Conceding then for the moment that a court may from the same facts reach different conclusions on different days, what is more important here is the incredibility of the second decision. In the instant case, there has simply been a misreading of the circumstantial facts, drawing from them an improper conclusion. Without a comparison of the records, the two opinions alone, as reported, reflect sufficient grounds for

reversing the appellate court in the instant case. In the first penal case the material facts are stated, carefully analyzed and reasonable conclusions are drawn therefrom. In the instant case many of those significant facts are simply ignored, though the same exhibits are in evidence. By ignoring important facts, the court here in *Weinberger* came to a contrary conclusion, assessing this fine against Dr. Peterson. It is respectfully submitted the analysis of the facts made in the *Weinberger* opinion is less reasonable, less logical and the reasoning process expressed therein is less astute. Thus, petitioner contends that the instant case should be reversed on the merits, because the conclusions reached therein are contrary to the true facts. Some facts were proven and should have been found from the evidence. Other facts were found by the court, but ignored. Also, as previously noted herein, the facts missing from the opinion are such that it was error to hold that petitioner's acts violated the False Claims Act. In other words, the conclusion in the instant case, as opposite to the opinion in the first penal case, should be reversed, for it simply reflects a low quality of justice.

A second contention of appellant is that there was a merger, and in the first decision there was an adjudication of all elements of the wrongful act alleged in the second case now before the Court. For a discussion, see issue 5 in the opinion of *U.S. v. Peterson, supra,* page C-8 of Appendix. There is double jeopardy here. The issue here has been settled, doctrine of res judicata. There has clearly been excessive prosecution here, a harrassment, and estoppel should prevent the bringing of charges here against Dr. Peterson. See the recent

case on collateral estoppel, *Ashe v. Swenson* (1970) 397 US 436, 25 LEd2d 469, 90 S.Ct. 1189.

In the instant case there is less evidence presented against Dr. Peterson than was done in the first case. And in the first case the evidence was not sufficient to support his conviction. In the instant case it is important that the court made no finding that Dr. Peterson filed false claims, instead the facts and evidence show he did no filing. This second case violates the rules of fairness and justice, as they exist in the present-day Federal judicial system. This second trial is prohibited by Amendment V and Amendment VIII; the verdict against Dr. Peterson should be set aside.

Conflict of Circuits, and Generally Confused Law

It is rather modest to describe the state of the law (as to what constitutes a violation of the F.C.A.) as being merely a conflict of circuits. This was done in *U.S. v. Cooperative Grain & Supply Co.* (CA8, 1973) 476 F.2d 47. In the *Aerodex* case, *supra*, at page 1007, circuits 2, 5, 6 and 9 are said to be in conflict with circuit 10. In those lengthy decisions discussing "intent," "knowing" and "scienter" there is brief mention of many decisions, showing inconsistencies, conflicts and confusion in the law. But those opinions failed to rseolve any problems. As a result, a practicing physician with patients under Medicare cannot know whether his actions do or do not violate the statute. Nor can his attorney precisely advise him. The confused state of the law in itself constitutes a hazard, even for the honest physician. The risk of unknowingly violating an unclear statute may of itself be as cruel as a

punishment of violation. There is some confusion, moreover, even under the U.S. Supreme Court decisions, as to the scope of the statute and the nature of the act constituting a violation. tion.

Recently the Court made a new examination of the intent of Congress in enacting the False Claims Act, *U.S. v. Neifert-White Co.* (1968) 390 U.S. 228, 88 S.Ct. 959, 19 L.Ed.2d 1061. This case represents a return to the basics. But it necessarily serves to modify earlier, more technical decisions such as, *U.S. ex rel. Marcus v. Hess* (1942) 317 U.S. 537, 87 L.Ed. 443; *Rainwater v. U.S.* (1958) 356 U.S. 590, 2 L.Ed.2d 996, 78 S.Ct. 946; *U.S. v. McNinch* (1958) 356 U.S. 595 2 L.Ed.2d 1001, 78 S.Ct. 950.

It is more accurate to describe the condition of the law, as reflected in the various court decisions on Section 231, as utter confusion rather than as merely a conflict of circuits. As described in *Cooperative Grain & Supply*, the first aspect of the conflict is what test is to be used, for some circuits use "knowing" while others use "intent to defraud." Passing from which test is proper, then there is a question of what kind of *intent, and in Cooperative Grain & Supply* the 8th circuit rejected the 9th circuit's requirement of "specific intent." Another area of confusion, involved herein, is whether intent may be imputed from conduct.

In the instant case the appellate court opinion fails to say what test was used, and this too is error. The evidence here shows appellant knew not, and that appellant has no intent to defraud. So appellant is hard put, to understand or object to

the propriety of the test used by the appellate court. Whatever test may be adopted, under that test there would be here no violation of the F.C.A. By avoiding all tests, the lower court's spurious reasoning arrives at an unsupported conclusion as to Dr. Peterson.

Appellant suggests the proper test is to be found in the brief decision in *Neifert-White Co.*, that the statute be applied to all types of efforts to defraud, but there must be an intent to cause a financial loss to the Federal government.[8] The rule of *Neifert-White* is that an accused, to violate the statute, must have an intent to cause a financial loss to the government, and the type of means used is not material. Under this test the charges against Dr. Peterson would be dismissed, due to the lack of intent, and also there was no loss by fraud. Under the present state of the law as to Section 231, there is no way of knowing with any degree of certainty what act of a physician filing a Medicare assignment or other conduct, as here, constitutes a violation of the F.C.A. Admittedly, the new additional Medicare statute, 42 U.S.C. § 1395(n)(n), Exhibit D of Appendix, is clearly written, but it is an *addition to* not an *in lieu of* penal statute. Thus, this 1972 amendment to the Medicare Act simply increases the weight of the statutory penal scheme, giving more power to beaucrats for use in depriving citizens of their rights.

[8] Incidentally, it was stipulated here that the physical therapy services billed for were performed. Thus, there was no fraud on the government, except to the extent of negligent duplicate billings. These resulted in a duplicate payment of $33 to Concord Manor.

Ignoring Stare Decisis Violates Appellant's Right to Due Process

It is a basic principle of the American judicial system that an earlier decision of a court establishes a rule of law, and that precedent is controlling law, unless of course it should be reversed. Here the appellate court in *Priola, supra,* adopted a rule of law, but in the instant case adopted a contrary result, and then the appellate court refused to overrule or reconcile its prior decision. Such quality of justice, or rather lack of justice, is abhorrent to the American judicial system, and violates the due process rule of Amendment V of the U.S. Constitution.

Appellant points out that the case, *U.S. v. Priola* (CA5, 1960) 272 F.2d 589 establishes a rule of law which is controlling here. It held that intent may not be imputed under the False Claims Act. To the same effect, there must be a "scienter," see *U.S. v. Cooperative Grain & Supply Co.* (CA8, 1973) 476 F.2d 47, second paragraph on page 56. For the application of this test to James Peterson in the instant case, see the appellate court decision, Exhibit B of Appendix. But the courts, though requested to do so by appellant's counsel, never applied this test to Dr. Peterson, which test according to the statute is an essential element of any violation. As a consequence, the lower courts were able to reach an erroneous conclusion of violation by Dr. Peterson. A reading of the facts in the opinion, or the evidence in the record, shows that as to Dr. Peterson there was no "scienter." The court's conclusion was based on implied intent, which was derived from Dr. Peterson's handling of the checks received. This act of

Dr. Peterson occurred 8 weeks after the wrongful act of filing. Such a holding is inconsistent with the *Priola*[10] case, as was pointed out to the lower courts.

The lower court is not here following the law. The lower court should be required to overrule *Priola,* to follow *Priola* or to reconcile *Priola* with its holding in the instant case. That controlling precedent establishes the law, and in the instant case the court's holding is inconsistent with the law. Does this not deprive Dr. Peterson of due process? Is he not entitled to have the law, as established in *Priola,* applied to his situation here? For the courts not to follow the law in a case is to deprive the litigant of his right to due process, as guaranteed in the Federal court system by Amendment V. This material error, unfair and violative of appellant's rights, ought to be corrected.

The appellate court simply ignored appellant's contention, the principal argument made at the brief oral hearing, that the law of the *Priola* case required a dismissal of F.C.A. charges against Dr. Peterson. The appellate court has not followed the rule of stare decisis.

Moreover, the holding in *Priola* is sound. In the instant case it is significant that there was no finding as follows: That Dr. Peterson knew the forms when filed contained a false statement. Such a finding is essential to any violation of the F.C.A. But it is error to imply a knowing, when done from independent events occurring 8 weeks after the wrongful act

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[9] And other like decisions of the Fifth Circuit, which are consisted with Priola.

filing. Further, such subsequent events do not support any implication that he earlier filed claims with an intent to defraud.

The decision in the instant case, with a holding inconsistent with the well-settled law, violates appellant's right to due process; thus the decision should be set aside as being contrary to the Amendment V right guaranteed to appellant.

Having Paid His Principal, Agent Not Liable to Third Party

When a physician receives a Medicare check of another physician, usually he forwards it to the designated payee. And here, where Dr. Peterson knew that the physical therapy services has been rendered (which was stipulated to), he forward the money to Zodiac, who had incurred the cost of providing the services (wages of three therapists). This was done in good faith, for he knew not about the false element in the forms filed.

This payment was in conformance with the Texas law of Principal/Agency. Any special moneys of a principal coming into the hands of an agent are considered trust funds, and it is the duty of the agent to forward them to the principal, *Driskill v. Boyd,* 181 S.W. 715. The agent is thereby discharged from liability.

In the alternative, appellant contends it was error to hold him jointly and severally liable with James E. Peterson. The evidence shows that Dr. Peterson had no economic interest whatsoever in this physical therapy operation. In fact it shows he overpaid $2,300, which he has not received. Thus, due

to his reliance on the accuracy of his secretary in making the deposit Dr. Peterson sustained a loss. Under these circumstances it is proper to impose any fine primarily on the principal who conceived the plan, filed the forms and received all the benefits. Any liability of the trusting agent should be at the most a secondary liability, and recovery should be from the agent only after and to the extent the third party has failed to collect from the principal. Admittedly, the principal and agent are brothers, but they are definitely different persons. The naive physician, needless to say, is now less trusting of his brother. In all fairness and under the law the collection should first be made from the wrongdoer/principal himself to the extent of his assets, and then only subsequently from an unknowing, trusting agent.

Fair Trial Denied Appellant

The denial of a fair trial to appellant affected his rights, not only in Plaintiff's case but also his defense in the False Claims Act case. There are three principal facts indicating that a fair trial was denied appellant, (1) time, (2) number of witnesses and (3) the role of trial judge.

A pre-trial order (P.T.O.) was submitted by appellant, and the trial time estimates therein should be compared with actual trial times. This is indicated in the following chart

The Litigation	Hours of trial time P.T.O.	Estimate Actual	Actual trial time as % of estimated
Plaintiff's case	44	1.5	3.4%
False Claims Act case	16	20	125%
Total	60	21.5	34%

The reason why? The trial judge before the trial advised appellant's counsel there would be no trial of Plaintiff's case, and as he had promised there was not. There was a reversal of the order of trial on the first day, and the trial judge in the corridor advised appellant's witnesses to go home as there would be no trial. The trial judge said before the trial opened that it would end on Friday afternoon early. And then at 3:30 on Friday appellant's counsel was allowed to call his first witness. In the short remaining time counsel was allowed to call two witnesses, both hostile and both were defendants. The record shows the government was allowed to call appellant as a witness in order to prove up its case. But when appellant's counsel asked for the third time to call appellant, the trial was immediately ended, Transcript 742, 743.

The second fact is the number of witnesses of appellant, as follows:

Description	*Number*
Number of witnesses listed in appellant's pre-trial order	37
Number of witnesses allowed appellant at trial	2

During the trial when questioned by the trial judge as to what witnesses were to be called by appellant, counsel replied: "those listed in the pre-trial order." T. 680. But he was allowed to call as witnesses only two of the defendants.

The third significant fact is the role of the trial judge. Here is one instance: in the pre-trial order appellant's counsel asked

again for a hearing on the motion for a sanction for failure in pre-trial discovery. Finally, near the end of the trial (on the fourth and next to last day of the trial) appellant's counsel was able to get a hearing on that motion. A witness, Gruninger, one of the defendants, was called. During the short examination allowed by trial court appellant's counsel was interrupted in his presentation 15 times by the trial judge, and his role may fairly be described as that of an attorney representing the government.

The trial closed on an unjust note. We find appellant's counsel desperately trying to have at least the appellant testify as a witness. The trial judge's reply to this request was an order ending the trial.

Tort Proven

The three elements of a tort are (1) a wrongful act, (2) with intent, (3) resulting in damages. At the trial appellant was not allowed to prove damages, but the other two elements were proven, and the case should be remanded for hearings on the amount of damages sustained, if any. Though appellant could not testify for himself, nor his witnesses called, sufficient facts were proven indirectly from testimony of hostile witnesses to establish the tort.

Dr. Peterson was twice sanctioned, which incidentally is much more than a mere withholding of funds. He was sanctioned without any notice, without any determination, without any hearing. In fact, as indicated in the pre-trial order there was a total of 29 violations of the Federal Administrative Procedures Act. The sanctions were ordered here not by Jus-

tice Department or any penal officers of the government after due process, but by field investigators of the Bureau of Health Insurance, who had no authority to impose sanctions.

The sanctions were imposed in December, 1969 before the investigation was completed, prematurely. The sanction did not end at $20,000, but was continuing even after $80,000 had been withheld. Dr. Peterson was suspended, testified the investigators, on the belief Dr. Peterson billed for $22,000 of physical therapy services which had been previously billed and paid for by Concord Manor. For these agents to arrive at such a fallacious conclusion, there was gross negligence in the investigation, or perhaps there was an ulterior motive.

It should be noted here that these investigators were imposing these sanctions on the wrong person. The wrongful act, filing false claims, was done by James Peterson. Then why was Dr. Peterson sanctioned? This is indeed an interesting question. But it is not the responsibility of plaintiff, Dr. Peterson, to answer this. This is a part of the defendants' defense, to justify their wrongful acts. It is appellant counsel's belief, and belief of Dr. Peterson, that the investigators sought Dr. Peterson as a witness to testify against James Peterson, and these sanctions were used to pressure Dr. Peterson and induce him to cooperate, and accept a plea bargain offer.

Even after the government learned of their errors, there was a continuing abuse of Dr. Peterson to cover-up the errors. The sanctions were imposed for too long a period of time.

The file on Dr. Peterson was improperly retained in the

Bureau, and not forwarded to Justice until Dr. Peterson filed his petition in the Federal district court.

The imposition of sanctions at most should have been applied to Medicare payments, but here the scope was extended to two other programs other than Medicare.

A foreseeable consequence of imposing these sanctions was a taking away of patients from Dr. Peterson's medical practice, and this taking of property was done without due process.

Dr. Peterson tried again and again, but he could not get reinstated. All these foregoing, proven facts were sufficient to prove the wrongful act element of tort.

The element of intent was also proven. Obviously there was a conspiracy here among defendants. The imposition of sanctions required concerted action. The conspiracy is evidenced by the letters from the Bureau of Health Insurance to the three insurance companies, incidentally the letter to one insurance company has never yet been discovered by appellant's counsel. The two letters introduced in evidence on their face are patently deficient, for they contain no mention of any determination or notice. The sanctions were secretly imposed, and Dr. Peterson was not notified. Having established this, a prima facie case, then a presumption of malice arises, and the burden shifts to defendants, who here failed to introduce evidence to justify their actions.

The evidence shows a gross abuse of Dr. Peterson, his property and his administrative rights. The supervisor of these

field investigators was negligent; she testified she knew little about what was going on in the Peterson case. T. 223-243.

There was a conference held with Dr. Peterson, some six months after sanctions were imposed. That conference was not a hearing under the Administrative Procedure Act, but was for the purpose of giving *Miranda* warnings to Dr. Peterson and, they say, to obtain his confession!

Dr. Peterson requested specific charges and information about his case. He had a right thereto, *Goldberg v. Kelly* (1970) 397 U.S. 254. These demands, and Dr. Peterson's rights, were ignored by the investigators and their supervisor.

There was more harrassment of Dr. Peterson proven at the trial, but a recital of it is beyond the scope of this petition. The proof of these facts, contends appellant, is the proof of a wrongful act done with ulterior motives by a conspiracy of the defendants. It was error for the lower courts to conclude otherwise. The case should be remanded with instructions to conduct a hearing to determine the amount of damages due Dr. Peterson.

A review of the cases decided under the Federal tort claims act is beyond the scope of this petition. But a brief review was made, and it is appropriate to mention counsel's conclusions. The intent of the Congress, as enacted in the statute, is clear that there was to be a waiver of governmental immunity, and the statute should be liberally construed. The U.S. Supreme Court decisions have been consistent with this policy. But unfortunately the general application of the statute is to the contrary in the lower Federal courts and in the Justice

Department, each for different reasons have frustrated the policies of the Congress and the U.S. Supreme Court. The treatment accorded Dr. Peterson here in this case is a part of the insubordination mentioned.

Error Not to Impose Rule 37 Sanctions, When Governmental Agencies Refused Pre-trial Discovery

There was a failure in pre-trial discovery efforts made by appellant's counsel, who sought to inspect the entire case file on Dr. Peterson, and the principals Zodiac, Concord Manor and Greater Irving Home & Health Agency. Moreover, the government responses to appellant's interrogatories were evasive, inane and arrogant. Objections were timely made by appellant to the trial judge, and in the pre-trial order the outstanding motion for a sanction under Rule 37 was duly listed.

The trial judge refused several requests of appellant for a hearing on this motion, but finally the judge heard it on the fourth and next to last day of the trial. Thus, we find the persistent counsel for appellant on the fourth day of trial still trying to inspect the complete case file on Dr. Peterson, a part of his pre-trial discovery right under the Rules. At the trial the judge limited discovery to Rule 34, a production of documents, whereas appellant's counsel sought an inspection under Rule 26. Appellant's motion for imposition of sanctions was denied. This was error.

The indifference of this trial judge to Rules 26 and 37, as shown by the record in this case, reflects adversely on the Federal judicial system. His delay of the hearing and his denial of appellant's motion to impose a proper sanction

make the Federal Rules into a ridiculous mockery, an empty show. This result was not intended for the Rules. 28 U.S. U.S.C.A. § 2072.

Obviously there was a failure in discovery. The government witness, Carl Gruninger, a defendant, admitted the case files tendered to appellant's counsel were incomplete. T. 396-417. At least 15 important documents, obtained elsewhere, were not in the file. Other documents which obviously should be there, and were never seen by appellant's counsel, were missing. Some documents in the files made reference to other documents therein, but the other documents were missing.

It has been held that a failure to comply with a discovery order, which was the case here, is a refusal to obey, *Societe Internationale v. Rogers* (1958) 357 U.S. 197. The defendants could not explain the reason why documents were missing, though the burden was on them.

The proper action here is to impose the proper sanction, as provided by Rule 37. Appellant's counsel was seeking evidence to prove the wrongful acts, the existence of a conspiracy and malicious intent of the defendants. Presumptions should be made that appellant proved these facts, and a directed verdict entered, followed by hearings on actual and exemplary damages in tort.

DEFENDANTS HEREIN ARE LIABLE

The Federal government, and these government employees here, are liable for their torts against Dr. Peterson. Admittedly there is governmental immunity, but appellant contends there

is liability here under the Federal Tort Claims Act. The Act waives governmental immunity from suit in sweeping language. *U.S. v. Yellow Cab Co.* 340 US 543, 95 L.Ed2d 523, 71 S.Ct. 399. Also, there is individual personal liability for these field investigators of the Bureau of Health Insurance, who exercised police powers of the governmnet (which they did not possess) in ordering the insurance company defendants to impose sanctions on Dr. Peterson. Likewise, the insurance companies are liable in tort, for imposing sanctions on the basis of invalid orders, not issued by proper governmental authorities.

The exercise of police powers of the Federal government took place without any due process whatsoever, as if the Administrative Procedures Act had never been enacted. Appellant objects to abuse and deprival of 29 rights granted by this Act. Many of these abuses were proven.

The problem here is like that of most persons seeking recovery under the Federal Tort Claims Act. The Justice Department is over-zealous in putting up procedural stalls to prevent recovery from the government. The lower Federal courts, are not sympathetic to claimants of tort damages. Only the Supreme Court seems to comply with the statutes, which means many worthy claimant lose out to the hazards and costs of litigation, barriers to recovery and relief intended by Congress to damaged claimants.

We have here a worthy claimant. He had rights, and those rights were abused. He had a right to a hearing before his suspension, Title 19, § 1902(3), *Goldberg v. Kelly* (1970) 397 U.S. 254. There is liability if he is denied his right to a hear-

ing before sanctions are imposed, *Wood v. Strickland* (1975) ..... U.S. ....., 43 L.Ed.2d 214. There is definitely a tort liability, *Bivens v. Six Unknown Fed. Narcotics Agents* (1971) 403 U.S. 38, 29 L.Ed.2d 619, 91 S.Ct. 1999.

The scope of the Supreme Court decision in *Goldberg v. Kelly* was limited by a court of appeals decision in *Hilburn v. Butz*, (CA5, 1972) 463 F.2d 1207. And here in the *Peterson* case it would be further limited, for the facts cited for the *Hilburn* exception are not existent here. In *Hilburn* there was a hearing at least, and the litigant could continue in business where here the physician could not.

The lower courts have proceeded here in their adjudication as if the *Bivens* case had never been decided. *Bivens* holds that liability exists. This decision has been followed by subsequent Supreme Court decisions clarifying and reducing the shield of governmental immunity, *Scheuer v. Rhodes* . . ., *Goss v. Lopez* . . ., and *Wood v. Strickland, supra.* But in the Fifth Circuit there seems to be a reluctance to give broad effect to these decisions. The instant case, thus, offers the Court an opportunity to emphasize further the changed and less-limited scope intended for governmental immunity, particularly when Federal investigators acts as policemen, judging and sanctioning and other acts clearly in excess of their authority.

As to other recent Supreme Court decisions in the same trend, reducing immunity and increasing liability, see *Doe v. McMillan* (1973) 412 U.S. 306, and *Logue v. U.S.* (1973) 412 U.S. 521. The situation with respect to governmental immun-

ity and liability may perhaps be described as: the Congress and Supreme Court are playing one musical tune, but the lower Federal courts and Justice Department have been marching to a different tune. The result, unfortunately, as reflected in the annotated code has been to deny payments to almost all claimants, even worthy ones.

The appellate court cites *Barr v. Matteo* (1959) 360 U.S. 564, then concludes that "all the agents were shielded by immunity." In the light of subsequent Supreme Court decisions, the cited authority, for governmental executives, fails to support their conclusion. These agents were only field investigators. They were not authorized to write letters to insurance companies directing them to sanction physicians. Their acts were wrongful, and they exceed the authority vested in them by the government. Therefore, they should be held personally liable.

The appellate court concluded that the three insurance companies were Medicare Intermediaries. Such conclusion is a finding of fact not warranted from the record. Only Group Medical & Surgical Service is a Medicare Intermediary, the other two companies are not. Further, governmental immunity should not be extended to Group Medical & Surgical Service. As testified to by the company's Vice-President, he considers his company not a governmental agency nor himself a governmental employee. Insurance companies who proceed to impose orders for sanctions which are patently invalid, should be liable in tort. The basic premise of the intermediary concept is to have an insurance company perform this function to escape

governmental bureaucracy procedures and rights, and quid pro quo, governmental immunity. The question here is how far, how far does immunity extend. Here there is error. Immunity has been extended too far, clearly.

Interest Payable on Unpaid Debt

The three insurance companies here complied with the letters they received from the Bureau of Health Insurance, naturally. They proceeded, as directed, to sanction Dr. Peterson, withholding payments and also all information about patient eligibility, processing of forms, etc. And they gave him no notice.

The appellant in this contention seeks only the interest due on the unpaid monthly balances, as distinguished from any tort damages. The unpaid balances consisted of uncollected fees due Dr. Peterson for medical services rendered his patients. Since the amounts withheld were substantial (as much as $89,000 at one time) and the harrassment continued for a prolonged period, the interest liability is estimated at about $14,000. As to the exact amount, the pre-trial discovery efforts produced only promises of counsel to produce insurance company schedules of the checks, from which the delinquency periods and amounts could be determined, and the interest could be computed check by check rather than estimated.

Incidentally, the interest liability would not be reduced here by the impact of the late-asserted "right-of-offset". A valid offset exists only after a claim has been asserted. Here the wrongful withholding occurred between December, 1969 and April, 1972, when the preliminary injunction order payments. The

crossfiling here for the $15,000 was not done until January, 1973, and even then no claim was asserted for the debt itself.

The issue is simple. The three insurance companies were debtors in default. Dr. Peterson, the creditor, is entitled to interest on the overdue debt. His claim is based in the law of contract of the State of Texas. Further, his right of collection is guaranteed by the U.S. Constitution under the special circumstances here. By reason of wrongful acts of Federal government employees, there was a taking of Dr. Peterson's property without due process of law. Therefore, he is entitled to just compensation therefor, as guaranteed by Amendment V of the U.S. Constitution. The trial judge should have awarded interest to Dr. Peterson, just as he had promised counsel immediately prior to the opening of trial, to obtain cooperation of counsel in changing the order of trial. It was error for the trial judge to change his pre-trial ruling, which was correct and in accordance with the law.

The principle of contract law involved here is itself not material. This contention, however, is significant to the Court, when considered with the other errors made below. It reflects truly the poor quality of justice in this case, the lower courts' indifference to law and finally their attitude towards any tort claimant who dares to file a petition in Federal court.

Injunctive Relief

An injunction is an extraordinary remedy, to be granted only when there is no other adequate remedy. The circumstances here warrant an injunction. The reputation of the

Bureau of Health Insurance is notorious, as to their high-handed investigators and their unlawful acts.

The wrongful, continuing acts here include:

1—imposing sanctions on the wrong person,
2—refusing to communicate (no hearing, no determination),
3—refusing to reinstate.

The wrongful acts here are acts of government agents, and their co-conspirators, overly cooperative insurance companies. Their wrongful acts of harrassment are contrary to Federal statutes, as follows,

1—42 USC 1395(a)—noninterference with medical practice,
2—42 USC 1395(g)—monthly payments,
3—42 USC 1395(n)(n)—hearings before suspension, fraud, etc.,
4— 5 USC 551-559—Administrative Procedures Act.

Moreover their wrongful acts are contrary to the case law, *Aquavella v. Richardson* (CA2, 1971) 437 F.2d 397 and *Carol Gables Convalescent Homes, Inc. v. Richardson* (D.Ct., Fla., 1972) 340 F.Supp. 646. And when the acts of the Department of H.E.W. deny due process to a provider under Medicare, an injunction to restrain such action is proper, *Carol Gables* case.

The wrongful acts cause irreparable damage to the medical practice of Dr. Peterson, causing him to lose patients and turn away patients from his office, and they will never return. Thus, there is no other adequate remedy.

There is no government plan for reinstatement of Dr. Peterson after the termination of this litigation. So testified Mrs. McSteen, a defendant who previously suspended Dr. Peterson and who now serves with the same authority at the Bureau. The attitude of the Bureau and of these investigators towards the law and toward Dr. Peterson has not changed. Their wrongful acts include 29 violations of the Administrative Procedures Act. This gross conduct against Dr. Peterson, this flagrant disregard of statutes, indicates their attitude. Unless restrained by an injunction and directed specifically to obey the law as to this physician, their sanctions, their wrongful acts, will be continued.

The trial court stated there was no denial of due process here, citing a case describing the concept of due process as "elusive." It is respectfully submitted — a reading of Title 5, Sections 551-559 dispels the elusiveness, and that was the Congressional intent. Appellant is entitled to the protection intended by Congress from these provisions. As defendants fail, and refuse, to comply with the Federal statutes, they should be ordered by the courts to do so.

What appellant seeks here, in plain language, is a permanent and final end to this harrassment, which is continuing even today. Only an injunction will accomplish this.

CONCLUSIONS

The more material issues presented in this case are presented in outline form. Only the issues of general significance are mentioned in the conclusion. The first five issues relate to the False Claims Act case, the next three issues arise from Plaintiff's case and the final issue involves both cases.

1. There is considerable confusion in the law as to what conduct constitutes a violation of F.C.A. Persons filing claims and employees preparing claims are entitled to a clearer law.

2. There is a conflict of circuits as to "intent to defraud," "knowing" and other elements of the False Claims Act.

3. What is an excessive fine under Amendment VIII? The amount of $131,600 here for this appellant is unconstitutional.

4. The plea bargaining situation arising from multiple penal statutes deprives an accused of his rights, or imposes an excessive fine, depending on accused's decision on prosecutor's offer. In either event the statutes must be declared unconstitutional.

5. How many times may an accused be tried for the same alleged wrongful act, especially when he was first adjudged not guilty?

6. An injunction is to be issued only in circumstances where necessary, as here, to compel executive branch to obey valid Federal statutes.

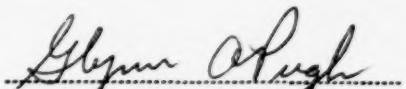
7. The lower Federal courts are obligated to follow, as to the Federal Tort Claims Act, the intent of Congress as set forth in the statute and the U.S. Supreme Court decisions.

8. Proper sanction (directed verdict) is to be imposed under Rule 37 of Fed. Rules of Civ. Proc., where executive departments of government refuse pre-trial discovery efforts in a tort case against the Federal government.

9. Denial of appellant's requests to call appellant as a witness was a denial of a fair trial, where appellant was plaintiff and also defending against a cross-claim, and particularly where appellant was allowed to call only two witnesses, both hostile.

As these issues are material, substantial and important, the Court should grant this petition for writ of certiorari.

Respectfully submitted,



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